INDEX

Table of Contents

	Page
Summary and short statement of the matter involved	3
Statement as to jurisdiction	9
Cases believed to sustain jurisdiction	13
Questions presented	13
Conclusion	29
Opinions of the Supreme Court of Florida	26

Table of Cases

Atkins v. *Atkins*, 325 U. S. 846, 65 Sup. Ct. 1400, 89 L. Ed. 1969 (certiorari granted)	10, 13
Atkins v. *Atkins*, 326 U. S. 683, 66 Sup. Ct. 20, 90 L. Ed. Adv. Ops. 29 (remanded)	10, 13
Dartmouth College v. *Woodward*, 8 Wheat. (U. S.) 518, 4, L. Ed. 629	13
Esenwein v. *Commonwealth of Pennsylvania*, 325 U. S. 279, 65 Sup. Ct. 1118, 89 L. Ed. Adv. Ops. 1152	11, 13
Griffin v. *Griffin*, 326 U. S. —, 66 Sup. Ct. 556, 90 L. Ed. 534	11
Hovey v. *Elliott*, 167 U. S. 409, 42 L. Ed. 215, 17 Sup. Ct. 641	13
Pennoyer v. *Neff*, 95 U. S. 714, 24 L. Ed. 565	13
Williams v. *North Carolina*, 317 U. S. 287, 63 Sup. Ct. 207, 87 L. Ed. 279	10, 13
Williams v. *North Carolina*, 325 U. S. 226, 65 Sup. Ct. 1092, 89 L. Ed. 1577	10, 13

Federal Questions Involved

1. Taking of property without due process of law	16
2. Denial of Full Faith and Credit	16

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 705

KENNETH TRESSLER,

Petitioner,

vs.

ADA A. TRESSLER, SHRIVER B. TRESSLER, AND RUTH WESTERBERG, AS RECEIVER

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States, Greeting:

Your petitioner Kenneth Tressler, a citizen and resident of the State of Nevada, respectfully petitions this Honorable Court for issuance of a writ of certiorari directed to the Supreme Court of Florida, the highest court of the State of Florida, to review the Orders of said Court dated July 2, 1946, affirming a final decree of the Circuit Court of Broward County, Florida, dated January 7, 1946, and the order dated July 31, 1946, denying the duly filed petition for rehearing filed by Kenneth Tressler in said Supreme Court.

Petitioner respectfully shows unto this Honorable Court that by the orders of the Supreme Court of Florida affirming the Final Decree dated January 7, 1946, petitioner has been deprived of his property without due process of law, and the Circuit Court of Broward County, Florida, refused petitioner the right to plead and defend the taking of his property, and refused petitioner the right to plead and rely upon a valid and unimpeached final decree of divorce entered on July 17, 1945, by the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, obtained upon valid constructive service of process by publication made upon respondent Ada Zoeller Tressler, and dissolving the bonds of matrimony theretofore existing between said Ada Zoeller and petitioner's father, Shriver Bert Tressler. That said final decree of divorce was obtained upon the ground of extreme cruelty, a ground of divorce also prescribed by the laws of Florida. That the Circuit Court of Broward County, Florida, refused to admit in evidence a duly exemplified copy of the judicial proceedings of the State of Nevada granting said final decree of divorce, based upon valid constructive service of process and denied full faith and credit thereto.

That six months after entry of the Nevada divorce decree the Florida court took real property valued at about $100,000.00 from petitioner in order to pay alimony to Ada Tressler, the divorced wife of petitioner's father.

That the State of Florida was not the matrimonial domicile of origin of the marriage contract, and neither spouse was a citizen of or domiciled in the State of Florida.

That the State of Florida lacked jurisdiction over the marriage res, and neither spouse had resided even temporarily within the State of Florida, for ninety (90) days required to impart and vest jurisdiction in the courts of the State of Florida over the marital status of citizens.

The Ada Tressler upon invoking the jurisdiction of the Florida court to obtain a decree of permanent separation with permanent alimony, did not allege and did not prove jurisdictional residence within said State prior to commencement of such action, and failed to allege any particular ground of divorce prescribed by the laws of Florida to maintain an action for permanent alimony based upon a ground of divorce.

That the attempted constructive process obtained by Ada Tressler in the Florida court was null, void and ineffectual to impart jurisdiction over the person of the defendants and due process of law was not had.

That the property taken from petitioner had been purchased for him by his father Shriver Tressler with his personal funds and with the knowledge of Ada Tressler, and most of said property had been purchased with her consent for petitioner.

That petitioner is physically disabled and an honorably discharged soldier of the United States Army and dependent upon his father Shriver Tressler for support, and the property taken from petitioner by the Florida court had been purchased to provide petitioner with a means of livelihood (Tr. 180).

Summary and Short Statement of the Matter Involved

Nature of the Case

In an action for "alimony unconnected with divorce" (a limited divorce) commenced by Ada Tressler in the Circuit Court of Broward County, Florida, against her then husband Shriver Tressler a decree of permanent separation with permanent alimony was sought. To obtain such alimony plaintiff sought to impress a trust upon certain real property in Broward County, Florida, owned by Kenneth Tressler which had been purchased for him by his father

Shriver Tressler. Sequestration of and appointment of a receiver for said property was prayed (Tr. 1, 18-20).

Plaintiff contended that the father had purchased the property for his son with intent to defraud plaintiff of the means of support, although the Bill described numerous other real and personal properties in Maryland, West Virginia and Florida as being owned by the husband of greater value than the Florida properties purchased for the son (Tr. 11-12).

The marital domicile of the parties was the State of Maryland where they resided prior to visiting Florida for a few weeks as winter tourists. The parties separated in Florida on March 3, 1945, and the wife commenced her action four days later on March 7, 1945. They had been married only six months. The wife sought $52,000.00 per annum permanent alimony (Tr. 1, 15, 172, 186).

The husband left Florida where he was temporarily residing, returned to his home in Maryland, abandoned it, and went to reside with his son Kenneth Tressler who lived in Reno, Nevada (Tr. 69, 133, 308, 318-321).

Although a decree of permanent alimony was sought by the wife in the Florida action she failed to allege jurisdictional residence in that State prior to suit, and failed to allege upon which ground of divorce recognized in Florida she sought to maintain her action for permanent alimony (Tr. 1, 18, 1-20, 172).

While the Florida action was pending and prior to obtaining constructive service of process, the husband commenced an action in Nevada against Ada Tressler for divorce upon the ground of extreme cruelty. Extreme cruelty is a ground of divorce in Florida. Said action was filed in Nevada on May 7, 1945, after establishment of jurisdictional residence and domicile in Nevada. Based upon allegation and proof of jurisdictional residence in Nevada a final decree of divorce

was entered on July 17, 1945, by the Nevada court in favor of Shriver Bert Tressler (Tr. 308-322).

In the Florida action the wife on May 2, 1945, applied for constructive process by publication against Shriver Tressler and alleged that he was a resident of Florida and concealing himself therein so that personal service of process could not be made upon him, although the wife had actual knowledge that Shriver Tressler was residing in Reno, Nevada (Tr. 80, 133, 146).

No residence address in Florida was stated for Shriver Tressler and no residence address was stated in Reno, Nevada, for the defendant Kenneth Tressler. No residence address was stated for either defendant in the published Notice to Appear (Tr. 80, 81).

The Florida court lacked jurisdiction over the subject matter of the action for limited divorce and over the person of the defendants under the constructive process attempted.

The defendant Shriver Tressler did not appear or defend the Florida action. The defendant Kenneth Tressler on June 4, 1945, filed a special appearance to contest the jurisdiction of the Florida court over his person and property (Tr. 134, 136).

Rulings by the Court

3/13/45

1. Appointed a Receiver for Kenneth Tressler's property without notice or process and without requiring an indemnity bond. Allowed Ada Tressler to occupy a part of Kenneth Tressler's property without payment of rent therefor (Tr. 64-66).

6/4/45

2. Permanently enjoined Shriver Tressler, without notice, from serving Ada Tressler with process issued by the Clerk

of any Nevada court, within the jurisdiction of the Florida court (Tr. 135).

6/5/45

3. With knowledge of the pendency of the action for divorce in Nevada entered a decree pro confesso against Shriver Tressler under constructive process dated May 2, 1945, alleging him to be a resident of Florida (Tr. 142, 136).

6/13/45

4. After Ada Tressler failed to prove jurisdictional facts of ninety (90) days residence in Florida prior to suit, permitted her to offer and received her proof under an entirely different form of action without requiring any amendment of the pleadings or issuance of new process (Tr. 172, 175-176).

6/28/45

5. Entered an order dated June 28, 1945, awarding Ada Tressler temporary alimony, suit money and temporary attorneys fees pendente lite and made said award a lien upon all of the property described in the Bill. Directed the Receiver to take charge of all property described in the Bill and amendments. The lien was impressed upon Kenneth Tressler's property prior to the time he was required by law to do more than file an appearance in the cause (Tr. 261-264).

6/28/45

6. Erroneously held the special appearance *and motion to quash filed by Kenneth Tressler on June 4, 1945,* constituted a general appearance when only a special appearance had been filed and the motion to quash was not required by law to be filed until five days later (Tr. 134, 170).

7/6/45

7. Refused to consider Kenneth Tressler's duly filed motion to quash and entered a decree pro confesso against him for failure to file an answer (Tr. 265-270, 282).

7/7/45

8. Refused to vacate the decree pro confesso and allow him to file answer (Tr. 285, 333-380, 401-403).

10/15/45

9. Refused to admit in evidence a duly exemplified copy of the Nevada divorce proceedings including a copy of the final decree and entered judgment in amount of $750.00 against Kenneth Tressler for payment of Ada Tressler's attorneys fees on taking certiorari to the Supreme Court of Florida (Tr. 397, 308-322).

11/9/45

10. Denied Kenneth Tressler's motion attacking the jurisdiction of the Florida court over the subject matter of the action for "alimony unconnected with divorce" (a limited divorce) (Tr. 324-326, 401-403).

11/9/45

11. Denied supplemental motion to vacate decree pro confesso and for leave to file answer and counterclaim (Tr. 333-380, 401-403).

12/5/45

12. Denied Kenneth Tressler the right to cross-examine Ada Tressler and her witnesses at a hearing held on December 5, 1945 against him when most of the proof offered by Ada Tressler had been taken at a hearing held in June,

1945, prior to the time Kenneth Tressler was required to do more than appear in said cause (Tr. 431).

12/5/45

13. Denied Kenneth Tressler the right to be heard (Tr. 423-437).

1/7/46

14. Entered final decree against Kenneth Tressler only and impressed a trust upon property valued at about $100,000.00 in favor of Shriver Tressler for the purpose of paying temporary alimony pendente lite to Ada Tressler, the divorced wife of Shriver Tressler, six months after entry of the final and unimpeached decree of divorce entered in Nevada and with knowledge thereof (Tr. 459-461, 142, 397, 327-333, 401-403).

1/17/46

15. Entered an additional order for temporary alimony, suit money and temporary attorneys fees without notice to Shriver Tressler or to Kenneth Tressler, his alleged Trustee, awarding Ada Tressler temporary alimony for the months of August, 1945, through January, 1946, all subsequent to the entry of the final decree of divorce in Nevada and with knowledge thereof (Tr. 467-470).

1/17/46. 1/18/46

16. Directed the Receiver to pay to Ada Tressler or her attorneys the sum of $5,334.86 within 24 hours out of rents collected from the apartment buildings owned by Kenneth Tressler, and denied Kenneth Tressler the right to supersede said order (Tr. 466).

Kenneth Tressler appealed to the Supreme Court of Florida from the Final Decree dated January 7, 1946 entered against him and from the order dated January 17,

1946 disbursing the rents derived from his property. (Tr. 470).

The Supreme Court of Florida affirmed the final decree dated January 7, 1946 without opinion and did not consider the appeal from the order dated January 17, 1946 allowing additional temporary alimony *pendente lite* subsequent to rendition of the final decree of divorce in Nevada on July 17, 1945. (Tr. 508-509).

The order of affirmance entered by the Supreme Court of Florida was dated July 2, 1945. Upon petition for rehearing duly filed by Kenneth Tressler in the Supreme Court of Florida said petition was denied without opinion by order dated July 31, 1946. (Tr. 523).

Stay orders were entered by the Supreme Court of Florida for the purpose of taking certiorari proceedings to the United States Supreme Court on August 5, 1946 and October 21, 1946. (Tr. 525).

On October 7, 1946 certain of appellees filed a motion to vacate the stay order entered August 5, 1946 on the ground among others that no Federal question was involved. The Supreme Court of Florida denied said motion. (Tr. 531. 536-537).

On October 22, 1946 Mr. Justice Black entered an order extending the time for filing petition for writ of certiorari to and including November 20, 1946.

Statement as to Jurisdiction

This honorable Court has the power and authority in its discretion to review the Orders of the Supreme Court of Florida dated July 2, 1946 affirming the final decree of the Circuit Court of Broward County, Florida dated January 7, 1946 entered against Kenneth Tressler, and the order of the Supreme Court of Florida dated July 31, 1946 denying the duly filed petition for rehearing filed by

Kenneth Tressler in said Supreme Court. The time for filing petition for writ of certiorari was extended by order entered in this Honorable Court on October 22, 1946 by Mr. Justice Black, to and including November 20, 1946.

The power and authority to review the above styled orders of the Supreme Court of Florida is vested in this Court under Sections 344, sub-section (b) Title 28, United States Code, and under Section 350, Title 28, United States Code.

The action of the State court in refusing to admit in evidence a duly exemplified copy of the proceedings of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, including therein the final decree of divorce dated July 17, 1945 granted to Shriver Tressler and against Ada Tressler upon the ground of extreme cruelty, a ground prescribed by section 65.04 Florida Statutes, 1941, was in direct contravention of Article 4, Section 1, Constitution of the United States and Section 687, Title 28, United States Code, as well as in violation of Section 92.10 Florida Statutes, 1941.

The action of the Florida State court in refusing to accord full faith and credit to the aforesaid final decree of divorce based upon valid constructive service of process and unimpeached, and the refusal by said State court to permit Kenneth Tressler to plead and rely upon said final decree of divorce as determinative of the right of Ada Tressler to subject his property to payment of alimony to her, was a further denial of full faith and credit to the Nevada decree and was in direct conflict with the decisions of this Honorable Court rendered in *(Williams et al.* v. *North Carolina,* 317 U. S. 287, 63 Sup. Ct. 207, 87 L. Ed. 279, and on re-hearing 325 U. S. 226, 65 Sup. Ct. 1092, 89 L. Ed. 1577; *Atkins* v. *Atkins,* 325 U. S. 846, 65 Sup. Ct. 1400, 89 L. Ed. 1969 certiorari granted; and *Atkins* v. *Atkins,* 326 U. S. 683, 66 Sup. Ct. 20, 90 L. Ed. Adv. Ops.

29; and *Esenwein* v. *Commonwealth of Pennsylvania*, 325 U. S. 279, 65 Sup. Ct. 1118, 89 L. Ed. Adv. Ops. 1152.

The action of the Florida State court in directing its Receiver by order dated January 17, 1946 to pay to Ada Tressler or her attorneys within 24 hours the sum of $5,334.86 for accrued payments of temporary alimony, without notice to the former husband Shriver Tressler, or to his alleged trustee, Kenneth Tressler, and without the necessity of reducing such accrued payments of alimony to judgment, with issuance and levy of execution on the property of the husband, was directly contrary to the decision of this Honorable Court rendered in *Griffin* v. *Griffin*, 326 U. S. —, 66 Sup. Ct. 556, 90 L. Ed. Adv. Ops. 534.

While the order of the Circuit Court of Broward County, Florida entered against Kenneth Tressler on January 7, 1946 impressing a trust upon all of his property in Broward County, is not designated a final decree, yet such order was in legal effect a final decree as to Kenneth Tressler in that it deprived him of all his right, title, privilege and immunity in and to his property, guaranteed to him under the Fourteenth Amendment to the Constitution of the United States of America, Section 1 thereof, and the action of the Florida court in taking said property without due process of law was repugnant to said constitutional right.

The Federal questions of due process of law and the failure of said State court to grant full faith and credit to the judicial proceedings and final decree of divorce of the State of Nevada based upon valid constructive service of process were raised in the State Court in the following manner, to-wit:

1. By special appearance filed June 4, 1945 (Tr. 134) and motion to quash constructive process dated May 2, 1945. (Tr. 265) by 2nd. ground No. 5.

2. By certiorari to Supreme Court of Florida, (Tr. 291)

3. By motion challenging jurisdiction over subject matter. (Tr. 324).

4. By motion to dissolve receivership pleading final decree of divorce entered in Nevada. (Tr. 327).

5. By supplemental motion to vacate decree *pro confesso* and for leave to file answer and counterclaim. (Tr. 333).

6. By paragraphs I, VIII, IX, X, and XI of Answer. (Tr. 342).

7. By motion to dismiss incorporated in Answer, paragraphs 16, 17, 18 and 23 thereof. (Tr. 342, 366).

8. By second assignment of error filed December 10, 1945 upon appeal from judgment for $750.00 entered for Ada Tressler's attorneys fees. (Tr. 413).

9. By oral objection made before the chancellor at time of taking testimony against Kenneth Tressler on December 5, 1945, (Tr. 423, 431).

10. Full faith and credit was denied to the unimpeached final decree of divorce granted Shriver Tressler in Nevada dated July 17, 1945 by refusal by the chancellor to admit the judicial proceedings in evidence (Tr. 388, 397).

11. Full faith and credit was denied the unimpeached final decree of divorce granted Shriver Tressler in Nevada by denial of Kenneth Tressler's motion to dissolve receivership wherein said final decree was pleaded. (Tr. 327, 401-403).

12. Due process of law was denied and the Federal question was raised in the Supreme Court of Florida by assignments of error on appeal from the final decree. Said assignments being numbered 2, 3, 8, 9, 10, 11, 17, 18, 19, 22, 25, 26 and 27 challenging the jurisdiction of the state court over the subject matter of the action and over the parties defendant. (Tr. 491-494).

13. By paragraphs 1, 2, 3, 4, 13, 17, 19 and 20 of the petition for re-hearing filed in the Supreme Court of Florida. (Tr. 509-522).

Cases Believed to Sustain Jurisdiction

As to denial of full faith and credit:

Williams et al. v. *North Carolina*, 317 U. S. 287, 63 Sup. Ct. 207, 87 L. Ed. 279 and on re-hearing 325 U. S. 846, 65 Sup, Ct. 1092, 89 L. Ed. 1577
Atkins v. *Atkins*, 325 U. S. 846, 65 Sup. Ct. 1400, 89 L. Ed. 1969, certiorari granted
Atkins v. *Atkins*, 326 U. S. 683, 66 Sup. Ct. 20, 90 L. Ed. Adv. Ops. 29, remanded
Esenwein v. *Commonwealth of Pennsylvania*, 325 U. S. 279, 65 Sup. Ct. 1118, 89 L. Ed. Adv. Ops. 1152

As to taking petitioner's property without due process:

Hovey v. *Elliott*, 167 U. S. 409, 42 L. Ed. 215, 17 Sup. Ct. 841
Dartmouth College v. *Woodward*, 8 Wheat (U. S.) 518, 4 L. Ed. 629
Pennoyer v. *Neff*, 95 U. S. 714, 24 L. Ed. 565

Questions Presented

1. Can the courts of one State deny full faith and credit to a valid and unimpeached final decree of divorce of another State based upon a ground of divorce mutually recognized and obtained upon valid constructive service of process?

2. Where a divorced woman seeks to assert rights to obtain payment of alimony or support as a married woman can a valid and unimpeached final decree of divorce be pleaded in opposition to such claim?

3. Can the Courts of one State enjoin the exercise of jurisdiction over an action for divorce commenced in another State, and thereby attempt to defeat validly acquired juris-

diction over the person of a defendant served by valid constructive process in the divorce action?

4. Can the courts of any State other than the State of domicillary origin or the State entering a decree of divorce adjudicate upon the validity of a decree of divorce obtained upon valid constructive service of process?

5. Does the entry of a valid and unimpeached final decree of divorce obtained upon valid constructive process in one State terminate an award of temporary alimony or support *pendente lite* made by a court in another State?

6. Is valid jurisdiction acquired over the subject matter of an action for "alimony unconnected with divorce" seeking a decree of permanent separation with permanent alimony (a limited divorce) when the pleadings fail to allege jurisdictional residence or any particular ground of divorce to support a decree for permanent alimony?

7. Is due process of law followed where the pleadings and published process describe the form of action as one kind of action, and after entry of decree *pro confesso,* plaintiff is allowed to offer proof upon an entirely different form of action without amendment of pleadings or issuance of new process and without notice to the defendants of the change allowed to be made in the issues?

8. Is due process of law had where a defendant is served with constructive process as a resident of one State, when the record discloses and the court has actual knowledge that said defendant is actually residing in another State and the facts of residence are made *res adjudicata* by entry of a final decree of divorce based upon allegation and proof of jurisdictional residence in the latter State?

9. Is due process of law had when plaintiff fails to comply with the statutes allowing constructive service of process

and fails to make diligent search to determine and fails to allege any residence address for the defendants proceeded against by constructive process?

10. Where property of a non-resident defendant is unlawfully sequestered and placed in receivership, should such owner be restored to his property rights and be allowed to recover damages for loss of use and occupation, and reimbursement of amounts paid out of rents collected from said property under invalid orders for temporary alimony, suit money and temporary attorneys fees, together with lawful interest?

11. Where property is sequestered and unlawfully placed in receivership should the party obtaining the receivership be required to pay all costs of such receivership?

12. Where a litigant has been required to pay a judgment for attorneys' for another in an action over which the court entering such judgment lacked jurisdiction of the subject matter and over the parties, should the judgment debtor be allowed to recover the amount of attorneys' fees so paid together with lawful interest?

13. Where property of a litigant is taken unlawfully by a court in an action over which it lacked jurisdiction over the subject matter and over the parties defendant, should such litigant be allowed to recover all costs expended in such litigation defending his property rights, save and except the fees incurred by employment of his own counsel?

14. Is love and affection sufficient consideration to support a gift of real property made by a parent to a child?

15. Does the exercise of management over property given by a parent to a physically disabled child invalidate such gift?

16. Is it fraudulent for a parent to purchase real property for a child out of personal funds owned by such parent, when said parent retains ample funds and assets to fully discharge all obligations likely to be incurred during the lifetime of such parent including the obligation to furnish support to a wife?

Reasons Relied upon for Allowance of Writ

1. The Florida court lacked jurisdiction over the subject matter of the action for "alimony unconnected with divorce".

2. Due process of law was not had in obtaining constructive service of process upon the defendants.

3. Due process of law was not followed in allowing plaintiff to offer proof under a different form of action, after entry of decree *pro confesso*, without notice, new process, and amendment of pleadings to support the proof offered.

4. Full faith and credit was denied to the final decree of divorce entered by the Nevada court based upon valid constructive service of process, and said final decree was not impeached.

5. Defendant Kenneth Tressler was denied the right to be heard.

6. Defendant Kenneth Tressler was denied the right to challenge the jurisdiction of the Florida court over the subject matter and over the person and property of said defendant.

7. Defendant Kenneth Tressler was denied the right to plead and rely upon a valid and unimpeached final decree of divorce entered in Nevada against Ada Tressler as determinative of her right to subject his property to payment of alimony or support.

8. Kenneth Tressler's property was taken without due process of law.

9. Orders for payment of temporary alimony, suit money and temporary attorneys fees were entered without notice and made a lien upon Kenneth Tressler's property prior to the time said defendant was required to plead, and without an opportunity to be heard.

10. No fraud was perpetrated upon Ada Tressler and she could have obtained support out of the property of her husband which remained in him and was ample to provide support if she were lawfully entitled thereto.

11. Plaintiff and three of her witnesses testified that the Maxwell Apartments valued at $45,000.00 was purchased for Kenneth Tressler to provide him with a livelihood (Tr. 180, 199, 103, 219).

12. Plaintiff had actual knowledge of the purchase of the properties in Broward County, Florida, for Kenneth Tressler and the cost of each parcel (Tr. 229-236). No fraud was perpetrated upon her the gifts made to the son were valid.

WHEREFORE, petitioner Kenneth Tressler respectfully prays for the issuance of a writ of certiorari to the Supreme Court of Florida to certify and send to this Honorable Court a full and complete transcript of the record in that certain cause wherein Kenneth Tressler was appellant and Ada Tressler, Shriver B. Tressler and Ruth Westerberg, as Receiver were Appellees, lately pending in said Supreme Court of Florida, to the end that the cause may be reviewed and determined by this Honorable Court as provided by law. That the final decree dated January 7, 1946, entered against Kenneth Tressler and affirmed by the Supreme Court of Florida by order dated July 2, 1946, and petition denied by order dated July 31, 1946, shall each be reversed with costs, and petitioner further prays for such other and

further relief as may be appropriate and granted to petitioner in the premises.

JOSEPH A. FITZSIMMONS,
Attorney for Petitioner
Kenneth Tressler.

Orders Entered by Supreme Court of Florida on Appeal

IN THE SUPREME COURT OF FLORIDA

JUNE TERM, A. D. 1946, SPECIAL DIVISION A

KENNETH TRESSLER, *Appellant,*

vs.

ADA A. TRESSLER, SHRIVER B. TRESSLER, and RUTH WESTERBERG, as Receiver, Appellees

An Appeal from the Circuit Court for Broward County,

George W. Tedder, Judge

Miller & Fitzsimmons, for Appellant.
Davis & Lockhart and J. Lewis Hall, for Appellees.

OPINION—Filed July 2, 1946

Per CURIAM:

The decree appealed from is affirmed.
Chapman, C. J., Terrell, Thomas and Adams, J.J. Concur.
(Tr. 509-510)

IN THE SUPREME COURT OF FLORIDA

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—July 31, 1946

Counsel for Appellant having filed in this cause Petition for Rehearing or Stay of Cause and having been duly considered it is ordered that said Petition for Rehearing be and the same is hereby denied without prejudice to make application for a stay.

(The mandate in this cause has today been issued and mailed to the Clerk of the Circuit Court for Broward County.)

INDEX TO BRIEF

Table of Cases

	Page
Gredler v. *Gredler*, 36 Fla. 372, 18 So. 762	28
Godwin v. *Godwin*, 139 Fla. 309, 190 So. 603	23
Kellogg v. *Kellogg*, 93 Fla. 261, 111 So. 637	28
McCullough v. *McCullough*, — Fla. —, 23 So. 2d 139	28
Miller v. *Miller*, 33 Fla. 453, 15 So. 222	28
Phelan v. *Phelan*, 12 Fla. 449, 455	28
Preston v. *Preston*, 116 Fla. 246, 157 So. 197	25
Rollins v. *Rollins*, 155 Fla. 83, 19 So. 2d 562	28

Florida Statutes

Section 65.02 Florida Statutes, 1941	23
Section 65.03 Florida Statutes, 1941	23
Section 65.04 Florida Statutes, 1941	22
Section 65.09 Florida Statutes, 1941	22, 23
Section 65.10 Florida Statutes, 1941	24
Chapter 4988 Compiled General Laws of Florida, 1927	24
Chapter 4989 Compiled General Laws of Florida, 1927	24
Section 3196 Revised General Statutes, 1920	23
Section 3197 Revised General Statutes, 1920	24

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 705

KENNETH TRESSLER,

Petitioner,

vs.

ADA A. TRESSLER, SHRIVER B. TRESSLER, AND RUTH WESTERBERG, AS RECEIVER,

---

BRIEF OF PETITIONER

LACK OF JURISDICTION OVER SUBJECT MATTER

The action commenced by Ada Tressler in the Circuit Court of Broward County, Florida, was entitled "Bill for Alimony Unconnected with Divorce" (Tr. 1). The constructive process dated May 2, 1945, described the action as being a "suit for alimony unconnected with divorce and for a declaratory decree" (Tr. 81). The form of action for alimony unconnected with divorce is maintainable under Section 65.09 Florida Statutes, 1941.

By her action plaintiff sought a decree of permanent alimony (Tr. 18, 37). A decree of permanent alimony can only be decreed where grounds of divorce exist.

Plaintiff failed to allege any particular ground of di-

vorce to sustain her action for permanent alimony (Tr. 1-20). Section 65.09 Florida Statutes, 1941 provides as follows:

> "65.09 Alimony unconnected with divorce.—If any of the causes of divorce set forth in § 65.04 shall exist in favor of the wife, and she be living apart from her husband, she may obtain alimony without seeking a divorce upon bill filed and suit prosecuted as in other chancery causes; and the court shall have power to grant such temporary and permanent alimony and suit money as the circumstances of the parties may render just; but no alimony shall be granted to an adulterous wife."

Section 65.04 referred to in the foregoing statute provides:

> "65.04 Grounds for divorce.—No divorce shall be granted unless one of the following facts shall appear:
>
> (1) That the parties are within the degrees prohibited by law.
>
> (2) That the defendant is naturally impotent.
>
> (3) That the defendant has been guilty of adultery. If it shall appear to the court that the adultery complained of was occasioned by collusion of the parties, and done with the intent to procure a divorce, or that both parties have been guilty of adultery, no divorce shall be decreed.
>
> (4) Extreme cruelty by defendant to complainant.
>
> (5) Habitual indulgence by defendant in violent and ungovernable temper.
>
> (6) Habitual intemperance of defendant.
>
> (7) Willful, obstinate and continued deseration of complainant by defendant for one year.
>
> (8) That the defendant has obtained a divorce from the complainant in any other state or country.

(9) That either party had a husband or wife living at the time of the marriage sought to be annulled."

Section 65.03 Florida Statutes, 1941, provides as follows:

"65.03 No divorce shall be from bed and board, but every divorce shall be from bonds of matrimony."

Section 65.02 Florida Statutes, 1941, provides as follows:

"65.02 Residence required.—In order to obtain a divorce the complainant must have resided ninety days in the State of Florida before filing of the bill of complaint."

Section 65.09 for alimony unconnected with divorce was formerly Chapter 4988 Compiled General Laws of Florida 1927, and theretofore was Section 3196 Revised General Statutes, 1920.

In considering the effect of a bill entitled "Alimony unconnected with divorce" the Supreme Court of Florida in *Godwin* v. *Godwin*, 139 Fla. 309, 310, 190 So. 603 stated as follows:

"Thomas J. The complainant wife sought and obtained a decree granting her alimony. In her bill she did not pray for divorce but charged the defendant husband with desertion and with extreme cruelty because of his inordinate attention to other women.

"Because of the caption of the pleading i.e. 'Alimony Unconnected with Divorce' and its substance we understand that the statute to which complainant resorted for her relief is Section 4988 C. G. L. 1927, providing that if any cause for divorce exists in favor of the wife and she is living apart from her husband she may obtain alimony without procuring a divorce."

In the instant case the plaintiff's action was entitled "Bill for Alimony Unconnected with Divorce" and a permanent award of alimony was sought. The plaintiff's action was unquestionably bottomed upon Section 65.09 Flor-

ida Statutes, 1941, Chapter 4988 Compiled General Laws, 1927.

At time of taking plaintiff's proof the chancellor for the first time made inquiry as to the nature of plaintiff action, this inquiry was prompted after plaintiff had failed to prove jurisdictional residence, in Florida for ninety days prior to suit (Tr. 172). Upon discussion between the Court and plaintiff's counsel one stated that the action was for "alimony unconnected with divorce, while the other sensing the jurisdictional defect of residence informed the chancellor that plaintiff's action was for maintenance and contribution under Section 65.10 Florida Statutes, 1941 (Tr. 175-176). The chancellor without making the required jurisdictional determination from the pleadings and process, permitted plaintiff to offer her proof under this form of action.

Under Section 65.10 Florida Statutes, 1941 as construed by the Supreme Court of Florida in *Kiplinger* v. *Kiplinger*, 147 Fla. 243, 2 So. 2d. 870, residence in Florida is not required to maintain an action for maintenance and contribution. Under this form of action no award of permanent alimony can be made. Section 65.10 Florida Statutes, 1941 provides as follows:

> "65.10 Alimony unconnected with causes of divorce.—If any husband having ability to maintain or contribute to the maintenance of his wife or minor children shall fail to do so, the wife, living with him or living apart from him through his fault, may obtain such maintenance or contribution upon bill filed and suit prosecuted as in other chancery causes; and the court shall make such orders as may be necessary to secure to her such maintenance or contribution."

This section was formerly Chapter 4989 Compiled General Laws, 1927, and theretofore Section 3197 Revised General Statutes, 1920.

In *Preston* v. *Preston*, 116 Fla. 246, 157 So. 197 a similar situation occurred in that the plaintiff therein commenced an action for "alimony unconnected with divorce" and failed to prove jurisdictional residence or the ground of divorce relied upon, and the chancellor misconstrued the pleadings and proof and entered an order for temporary alimony, suit money and counsel fees. On rehearing the Supreme Court of Florida by *per curiam* opinion reversed the order awarding temporary alimony, suit money and attorneys fees, for failure to prove jurisdictional residence then required to maintain an action for divorce.

In a concurring opinion by a majority of the Justices, Chief Justice Davis took particular care to mark the distinction between the forms of action for "alimony unconnected with divorce" and the action for maintenance and contribution. In said opinion, 116 Fla. 246, 249–250, stated as follows:

> "• • • Upon reconsideration of the whole record it seems to me that the bill should be construed as attempting to state a case under Section 3196 R. G. S. 4988 C. G. L., which reads as follows:
>
> " 'If any of the causes of divorce set forth in Section 4983 shall exist in favor of the wife, and she be living apart from her husband, she may obtain alimony without seeking a divorce upon bill filed and suit prosecuted as in other chancery causes; and the court shall have power to grant such temporary and permanent alimony and suit money as the circumstances of the parties may render just; but no alimony shall be granted to an adulterous wife. (Ch. 3581, Feb. 14, 1885, Secs. 1, 2,).'
>
> "The proof was offered by the complainant below and apparently received by the Chancellor on the theory that the issue to be tried was that which could only arise under Section 4189 C. G. L., rather than 4188. Because of this circumstance, I think the decree here appealed from should be reversed on rehearing on

the authority of Schmitt *v.* Bethea, 78 Fla. 304, 82 Sou. Rep. 817; Earle *v.* Detroit & Security Trust Co. 103 Fla. 618, text 626, 138 Sou. Rep. 65; Atlantic Shores Corp. *v.* Zetterlund, 103 Fla. 761 (11th head note), 138 Sou. Rep. 50, wherein this Court held that a decree arrived at by a Chancellor on an erroneous conception of the pleadings and issues will be reversed and the cause remanded for reconsideration and rehearing in the lower court on the issues as correctly ascertained and declared by the appellate court.

"To maintain a suit under Section 4189 C. G. L., supra, the wife must be willing to live with her husband, although she is not precluded from relief if she is not living with him, provided she can show it was and is through the husband's fault that she does not do so. The suit authorized by this section is in the nature of an equitable suit for specific performance of the husband's marital duty to render his wife support, the right to which she has not lost or forfeited. On the other hand, the right to the relief authorized by Section 4188 C. G. L., supra, is in the nature of a limited divorce and is only authorized under circumstances that divorce itself is authorized. The distinctions between the rights arising under each of these sections, and the relief to be awarded, should not be ignored or confused.

"In this case, for a part of the time at least, the separation of the parties was by their mutual wish and acquiescence."

WHITFIELD and ELLIS, JJ. concur:

With this clear enunciation of the law no necessity existed for the chancellor in the instant case to repeat the error made in the case of *Preston* v. *Preston, supra.* Said decision has not been reversed or its effect changed by statute. It was repeatedly cited in the original brief filed in the Supreme Court of Florida and in the reply brief. No attention was apparently given to such briefs and the final decree was affirmed without opinion.

Unless the Circuit Court of Broward County, Florida, had jurisdiction of the subject matter of an action by proper allegations made in the pleadings it could not exercise valid jurisdiction.

As in the case of *Preston* v. *Preston, supra*, the plaintiff's proof was received by the chancellor in support of an action for maintenance and contribution under Section 65.10 Florida Statutes, 1941 (Tr. 175). The pleadings definitely attempted to state a cause of action for "alimony unconnected with divorce" for the purpose of obtaining an award of permanent alimony based upon causes of divorce, however plaintiff failed to allege or prove jurisdictional residence within the State of Florida for ninety days, the period of time now required to maintain an action for divorce, and plaintiff failed to allege upon which of the nine grounds of divorce under Section 65.04 Florida Statutes, 1941 she relied to maintain her action for permanent alimony.

Under this attempted exercise of jurisdiction by the circuit court of Broward County, Florida, and an invalid award of temporary alimony, suit money and attorneys fees, the property of Kenneth Tressler has been taken from him and subjected to payment of such void support order.

It is respectfully submitted that the Florida court lacked jurisdiction of the subject matter of the action, and its jurisdiction was repeatedly challenged by Kenneth Tressler in the lower and appellate court, but without consideration being given by either of said courts.

It is respectfully submitted that Kenneth Tressler's property was taken without due process of law.

In the *Preston* v. *Preston* case *supra,* the appeal was from an interlocutory order, and the Supreme Court of Florida remanded the case. In the instant case the plaintiff completed her proof upon the case attempted to be made against her husband Shriver Tressler on June 21, 1945 (Tr. 245).

It is the decided law of the State of Florida that where a plaintiff completes his proof without sustaining the issues laid in the pleadings filed therein, no amendment thereof can be permitted to make the pleadings conform to the proof offered and thereby change the issues relied upon.

In the recent case of *McCullough* v. *McCullough,* — Fla. —, 23 So. (2d) 139, 141, stated as follows:

> "(2, 3,) Amendments to meet the proof are generally held not to be allowable if they change the theory of the case or the cause of action. * * *"

In *Kellogg* v. *Kellogg,* 93 Fla. 261, 111 So. 637, 638, the Supreme Court of Florida stated as follows:

> "(4). This court is committed to the doctrine that, although the complainant may make out by proof a case which entitles him to relief, yet he can have no decree unless the allegations of the bill are adapted to the case proved, for the court pronounces its decree secundum allegata et probata. If a party intends to rely upon matter as constituting a ground of relief in equity, it ought to be set up in the bill; and, if not so set up, though it appears by the evidence in the record to have been proven, it should not be considered at the hearing. See St. Andrews Bay Land Co. *v.* Campbell, 5 Fla. 560; Thornton *v.* Eppes, 6 Fla. 546; Anderson *v.* Northrop, 39 Fla. 612, 12 So. 318; Goulding Fertilizer Co. *v.* Johnson, 65 Fla. 195, 61 So. 441; 3 Encyc. Plead. & Prac. 357."

Other cases supporting the proposition that after testimony is taken in an equity cause and plaintiff fails to prove the issues laid in the bill, no relief will be allowed are:

Phelan v. *Phelan,* 12 Fla. 449, 455;
Gredler v. *Gredler,* 36 Fla. 372, 18 So. 762;
Miller v. *Miller,* 33 Fla. 453, 15 So. 222;
Rollins v. *Rollins,* 155 Fla. 83, 19 So. (2d) 562.

When plaintiff failed to prove facts of jurisdictional residence in Florida for ninety days, the chancellor should have dismissed the bill. Had the chancellor examined the Bill of Complaint prior to issuing the order dated March 8, 1945 the chancellor no doubt would have declined to exercise jurisdiction.

No right of action existed in Ada Tressler against Kenneth Tressler. He owed her no duty of support, and he was not indebted to her in any manner. She had not furnished any part of the funds with which his property was purchased, and she did not assist her husband in earning or accumulating the funds used to make these purchases. She held no right to impress a trust upon the property of Kenneth Tressler.

Plaintiff and her attorneys have already collected the sum of $6,084,86 in cash as alimony and attorneys fees and suit money, out of the rents derived from Kenneth Tressler's property. Also Ada Tressler has, with members of her family, occupied a furnished apartment in Kenneth Tressler's Maxwell Apartment building without payment of rent therefor. Said occupancy has been with court approval since March 13, 1945 (Tr. 65, 406-407, 467-470).

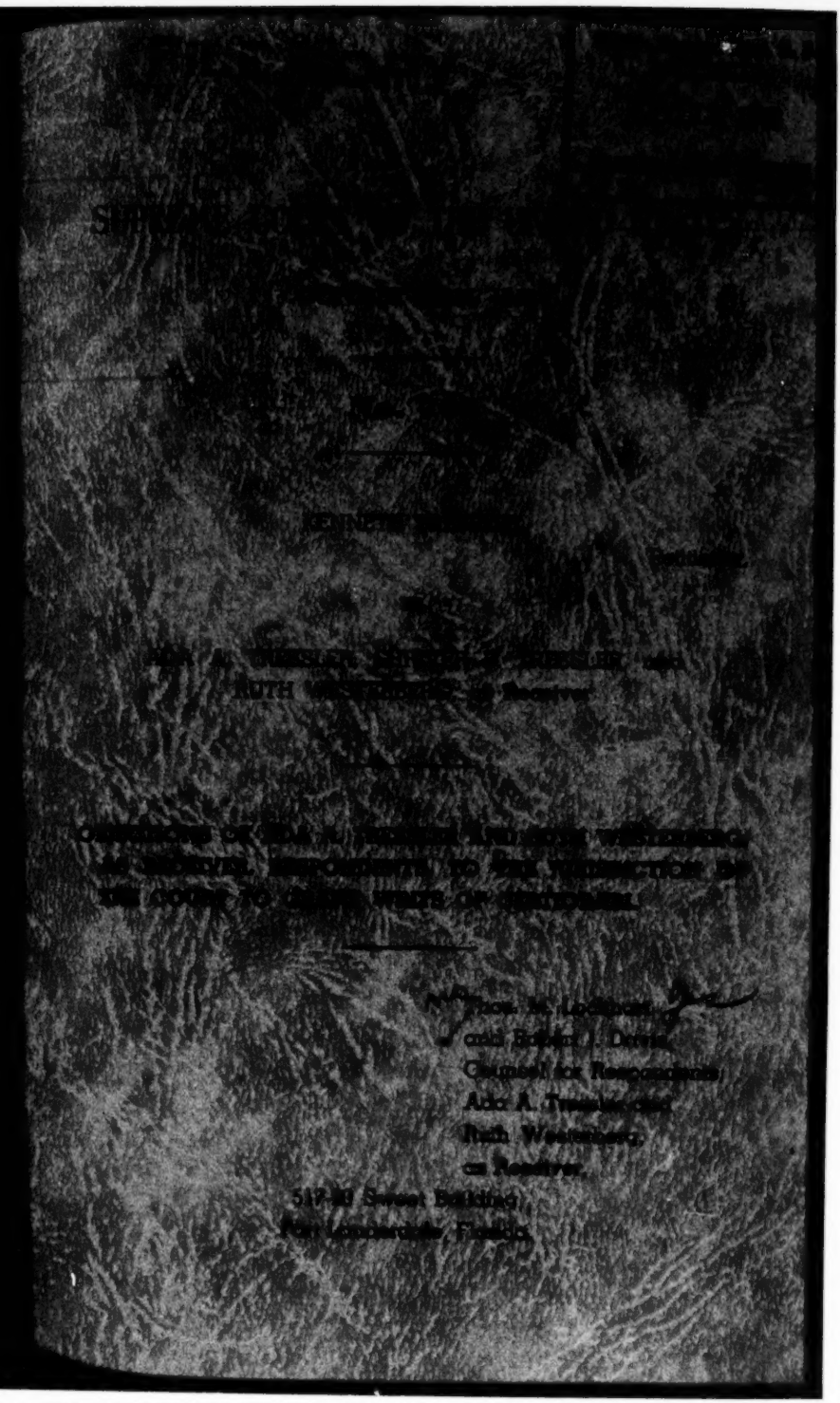
Conclusion

Petitioner respectfully submits that his property was taken without due process of law, and even if the Florida court had jurisdiction to enter a support order, such order was nullified by entry of the final decree of divorce on July 17, 1945 granted Shriver Tressler in Nevada and which has not been impeached.

Respectfully submitted,

JOSEPH A. FITZSIMMONS,
Attorney for Petitioner.

(7728)



INDEX

TABLE OF CONTENTS

	Page
Preface	2
Statement of the case deemed necessary in correcting inaccuracies and omissions in the statement of petitioner	5
Brief and Argument	13
Florida Declaratory Act, Appendix No. 1	23
Sub-section (g) Rule 35 of the Supreme Court of Florida, Appendix No. 2	26
Section 59.08 Revised General Statutes of the State of Florida, Appendix No. 3	26

TABLE OF CASES—FEDERAL

Adams v. Russell, 229 U. S. 353, 33 S. Ct. 846, 57 L. Ed. 1224	16
Central Vermont Ry. Co. v. White, 238 U. S. 507, 35 S. Ct. 865, 59 L. Ed. 1433, Ann. Cas. 1916B, 252	16
Chgo. R. I. & P. R. Co. v. Maucher, 248 U. S. 359, 39 S. Ct. 108, 63 L. Ed. 294	16
Dahnke-Walker Co. v. Bondurant, 257 U. S. 282, 289	15
Fox River Paper Co. vs. Railroad Commission of Wisconsin, 47 S. Ct. 669, 274 U. S. 651, 71 L. Ed. 1279 affirming 208 N. W. 266, 189 Wisc. 626	21
Gibson v. Mississippi, 162 U. S. 565, 16 S. Ct. 904, 40 L. Ed. 1075	17
Godchaux Co. v. Estopinal, 251 U. S. 179, 181, 64 L. Ed. 213, 214, 40 S. Ct. 116	16
Hendrick v. Maryland, 235 U. S. 610, 621	15
Angelo Herndon, Appellant, v. The State of Georgia, 295 U. S. 441-445, 79 L. Ed. 1530	15
Honeyman v. Hanan (N. Y. 1937), 57 S. Ct. 350, 300 U. S. 14, 81 L. Ed. 476, appeal dismissed 50 S. Ct. 273, 302 U. S. 375, 82 L. Ed. 312	16
Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 576	15
Liberty Warehouse Company vs. Burley Tobacco Growers' Co-Operative Marketing Association, 276 U. S. 71, 72 L. Ed. 473, 43 S. Ct. 291	15, 20
Loeber v. Schroeder, 149 U. S. 580, 585, 37 L. Ed. 856, 858, 13 S. Ct. 934	16
Palmer v. State of Ohio, 248 U. S. 32, 39 S. Ct. 16, 63 L. Ed. 108	16

Page

Richmond v. Irons, 121 U. S. 27, 7 S. Ct. 788, 30 L. Ed. 864, 10 R. C. L. 494 ---- 20

Rooker v. Fidelity Trust Co., 261 U. S. 114, 117, 67 L. Ed. 556, 563, 43 S. Ct. 288 ---- 16

Southwestern Bell Telephone Co. vs. State of Oklahoma, U. S. Okla. 1938, 50 S. Ct. 528, 303 U. S. 206, 82 L. Ed. 751 16

Southern Railway Co. v. King, 217 U. S. 524 ---- 15

Standard Stock Company v. Wright, 225 U. S. 540 ---- 15

Texas & P. R. Co. vs. Southern P. Co., 137 U. S. 48, 54, 34 L. Ed. 614, 617, 11 S. Ct. 10 ---- 16

Tidal Oil Co. v. Flanagan, 263 U. S. 444, 454, 455, 68 L. Ed. 382, 387, 388, 44 S. Ct. 197, and cases cited ---- 16

Western Union Telegraph Co. vs. Wilson, 213 U. S. 52, 29 S. Ct. 403, 53 L. Ed. 693 ---- 17

Wood vs. Brady, 150 U. S. 18, 14 S. Ct. 6, 37 L. Ed. 981 ---- 17

FLORIDA CASES

Biscayne Realty & Ins. Co. v. Ostend Realty Co., 109 Fla. 1, 148 So. 560 ---- 20

Condon v. Condon, 157 So. 117 ---- 18

Donnelly v. Donnelly, 39 Fla. 229, 22 So. 648 ---- 17

Driggers v. Pearson, 192 So. 881 ---- 18

Howell v. Howell, 113 Fla. 129, 151 So. 379, 154 So. 328 ---- 17

Johnston et al, v. Johnston, 165 So. 698 ---- 20

Kiplinger v. Kiplinger, 2 So. (2d) 870 ---- 17

Williams v. Keyes, Fla. 1939, 186 So. 250 ---- 16, 17

Wordinger v. Wirt, 112 Fla. 822, 151 So. 47 ---- 20

Zetrouer v. Zetrouer, 110 Fla. 312, 149 So. 343 ---- 20

INDIANA CASE

Pgh. C. C. & St. L. R. Co. v. Sullivan, 141 Ind. 83, 40 NE 138, 27 L. R. A. 850 ---- 19

FLORIDA STATUTES

Section 5908, Appendix No. 3. ---- 26

Florida Declaratory Decree, Appendix No. 1. ---- 23

Sub-section (g) Rule 35 of the Supreme Court of Florida, Appendix No. 2. ---- 26

TEXTS

Am. Jur. Vol. 27, Section 419, P. 25-26 ---- 18

Am. Jur. Vol. 41, Section 82, p. 249 ---- 19

Am. Jur. Vol. 41, Section 83, p. 349 ---- 19

Kooman on Florida Chancery Pleading and Practice page 265 ---- 19

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 705

KENNETH TRESSLER,

Petitioner,

vs.

ADA A. TRESSLER, SHRIVER B. TRESSLER and RUTH WESTERBERG, as Receiver.

OBJECTIONS OF ADA A. TRESSLER AND RUTH WESTERBERG, AS RECEIVER, RESPONDENTS, TO THE JURISDICTION OF THE COURT, TO GRANT WRITS OF CERTIORARI.

To the Honorable, The Supreme Court of the United States, Greeting:

The respondents, Ada A. Tressler and Ruth Westerberg, as Receiver, believing that the matters set forth below will demonstrate the lack of substance in the questions raised by the petitioner, files this their objections to the jurisdiction of the Court to grant writs of certiorari on the ground that the questions raised on behalf of petitioner are so unsubstantial as not to need further argument.

PREFACE:

(a) The divorce decree obtained by the defendant husband, Shriver B. Tressler, has never been offered in evidence by him whereby the trial court, or the Supreme Court of Florida, could give or refuse to give full faith and credit.

(b) The question of giving full faith and credit, under Article 4, Section 1 of the Constitution of the United States, to the divorce decree of defendant husband, Shriver B. Tressler, has never been presented, or passed upon by the trial court, or the Supreme Court of the State of Florida.

(c) The divorce decree of the husband, Shriver B. Tressler, was first sought to be introduced in the trial court by the United States Fidelity and Guaranty Company to its liability upon a supersedeas bond filed by it, prior to the date of the divorce decree, upon an appeal by defendant, Kenneth Tressler, to the Supreme Court of Florida, in an ancillary proceeding to the original suit herein, for a judgment against the United States Fidelity and Guaranty Company, as surety, under subsection (g) of Rule 35 of the Supreme Court of Florida, hereto attached as Appendix No. 2, which divorce decree was sought to be pleaded in the court below as follows:

1.

It plead and filed a copy of the divorce decree to it's response to the motion for judgment on the bond to which movant objected on the ground that it was not a defense available to the respondent surety company and the trial court sustained the objection and ordered same stricken from the record.

2.

On the taking of proof under the citation, issued by the trial court, the surety, United States Fidelity and Guaranty Company, offered as evidence in its behalf an exemplified copy of the divorce decree of Shriver B. Tressler obtained in Nevada on July 17th, 1945, as its evidentiary exhibit No. 1. Respondent's objection

to the filing of same was by the Court sustained on the ground that it was no defense available to surety, United States Fidelity and Guaranty Company.

Notice of appeal, to the Supreme Court of Florida, was entered by the United States Fidelity and Guaranty Company and Kenneth Tressler on November 30th, 1945, and assignment of error No. 6 assigned as error the refusal of the trial court in refusing to admit in evidence exemplified copy of final divorce decree and proceedings of Shriver B. Tressler in Nevada offered by the defendant surety company.

The cause was heard by the Supreme Court of Florida, and on the 2nd day of April 1946, the action of the lower court, together with other errors assigned, was, by the Supreme Court of Florida, affirmed. These alleged errors of the trial court and the Supreme Court, as to these two attempts to inject the divorce decree into this suit, is not involved in the present appeal.

(d) The defendant, Kenneth Tressler, on October 27th, 1945, against whom a decree pro confesso had been entered and still in full force and effect at the time, and without permission of the court, filed his motion in the trial court to dissolve receivership, discharge receiver, cancel Lis Pendens and for an accounting and, among other things set out, that the relationship of husband and wife theretofore existing between plaintiff, Ada A. Tressler, and defendant, Shriver B. Tressler, had been dissolved by final decree of divorce in Nevada on July 17th, 1945, and filed a copy of said divorce decree as exhibit "A" to his motion. On motion of counsel for plaintiff the trial court by order dated the 9th day of November 1945, entered of record on the 13th day of November, disallowed the motion of Kenneth Tressler and struck same, and the exhibits thereto, from the files.

No appeal was taken, by any of the defendants, to the alleged error of the trial court in striking said motion and the exhibits (exhibit divorce decree) from the files within sixty days from the

date thereof as provided by Section 59.08 Florida Statutes Annotated, hereto attached as Appendix No. 3, or at any other time thereafter, and such alleged error, if error, is not involved in the present appeal.

(e) It is settled law that a decision resting on State procedure, or matters affecting the remedy sought to be enforced, are governed by the laws of the forum and the decision of the state court on matters of state pleading and practice is not reviewable by the Supreme Court of the United States and does not present a federal question.

(f) The Supreme Court of the United States will not review the decision of a state court that a bill or petition, from its contents, is predicated and meets the requirements of the particular statutes of the forum although named or called by the pleader a proceeding under another statute of the forum.

(g) It is the general law that the theory of a pleading under modern practice provisions that states the facts on which the plaintiff relies, is sufficient and maintainable and when so held by a state court, the United States Supreme Court will not review such action to determine whether or not such pleading is in accordance with the laws of the forum.

(h) It is the law in the State of Florida that the sufficiency of the Bill of Complaint is not essential in issue on an application for temporary alimony, solicitor's fees and costs as defects, if they exist in the Bill of Complaint as filed, as it may be amended and this court will not review the decision of the trial court and the Supreme Court of Florida thereon, as no federal question is raised thereby.

(i) The question of due process of law sought to be raised by the petitioner, Kenneth Tressler, on behalf of the husband, Shriver B. Tressler, has not been presented by Shriver B. Tressler and passed upon by the Supreme Court of the State of Florida and

Shriver B. Tressler is not seeking a review by this Court on any decision of the state court denying to him due process of law.

(j) The question of due process of law to the husband, Shriver B. Tressler, is not available to the defendant, Kenneth Tressler.

(k) The record discloses that the defendant, Kenneth Tressler, entered his appearance in the trial court and that this cause, at the instance of the defendant, Kenneth Tressler, has been before the Supreme Court of the State of Florida four times, including this last appeal, and that by reason thereof, the petitioner in this court has not been denied due process of law, as guaranteed by the Constitution of the United States, by the Florida state courts.

(l) The petition herein fails to set forth the necessary prerequisite, that a federal question was affirmatively presented to the Supreme Court of Florida, that its decision was necessary to the determination of the cause, that it was actually decided, or that the judgment as rendered could not have been so without deciding it, in order to obtain a review by the United States Supreme Court.

(m) The Supreme Court of the United States will not review the action of a state court upon a mere declaratory judgment or decree.

(n) The long established general rule is that the attempt to raise a federal question, after judgment, upon a petition for rehearing comes too late, unless the court actually entertains the question and decides it.

STATEMENT OF THE CASE DEEMED NECESSARY IN CORRECTING INACCURACIES AND OMISSIONS IN THE STATEMENT OF PETITIONER.

The Verified Bill of Complaint in this cause was filed on March 7th, 1945, by Ada A. Tressler (wife) vs. Shriver B. Tressler (husband), Kenneth Tressler (son of Shriver B. Tressler), and Ruth Westerberg (as agent of Shriver B. Tressler) (R. 1-20);

On March 9th, 1945, plaintiff filed her first amendment to the Bill of Complaint (R. 35-36);

On March 10th, 1945, plaintiff procured an order of the Court permitting her to file her second amendment to the Bill of Complaint (R. 39);

On the same date plaintiff filed her second amendment to the Bill of Complaint (R. 39-41);

In paragraph one, of the original Bill of Complaint, plaintiff alleged that she was a bona fide resident of the City of Fort Lauderdale, County of Broward and State of Florida, and that all of the defendants were residents of the City of Fort Lauderdale, Broward County, Florida, except the defendant, Kenneth Tressler, who resides in the State of Nevada and that all of the defendants were over the age of twenty-one years (R. 1);

That plaintiff and defendant, Shriver B. Tressler, are husband and wife (R. 1);

That on March 3rd, 1945, the defendant husband, Shriver B. Tressler, told plaintiff that he had fixed all his money and property so that she could get nothing from him and that he was through with her and to get out and leave their home and refused to give plaintiff any money to live on and told her that if she thought she could get anything to try and do so and forced and compelled her to leave their home where they were living and that she, plaintiff, was without any money or means of support, (R. 9);

That during the night of March 4th, 1945, the defendant removed all his clothing and effects from their apartment and is now hiding and concealing himself from plaintiff, as plaintiff believes and charges, to avoid any process, issued by this Court, being served upon him, (R. 9);

That in furtherance of a scheme, plan and purpose on the part of the said defendant, Shriver B. Tressler, to rid himself of plaintiff without providing for her support and for the purpose of leaving her destitute, said defendant did fraudulently and without consideration and in furtherance of his said scheme, caused the title to the following property in Broward County, Florida, to be placed

in the name of his unmarried son, the defendant, Kenneth Tressler, for all of which the defendant, Shriver B. Tressler, paid the full consideration therefor, and no part of same was paid by Kenneth Tressler, or any amount of the consideration to defendant, Shriver B. Tressler, to-wit: (and then it sets-out full description of the property) (R 13-14);

That the property setout and described conveyed to the defendant, Kenneth Tressler, son of defendant, Shriver B. Tressler, and that by virtue of Chapter 21,820 of the Acts of Legislature of the State of Florida of 1943, plaintiff is entitled to a declaratory decree adjudging and decreeing that said property is held in trust by Kenneth Tressler for Shriver B. Tressler and that the same is liable, together with the rents and profits, to any judgment or decree of this Court for temporary and permanent alimony and support and suit money and attorney fees that may be decreed in favor of plaintiff (Paragraph 7 of Bill of Complaint) (R. 14-15);

A true copy of the declaratory act of Chapter 21820 of the Acts of the Legislature of the State of Florida of 1943 is set-out in appendix No. 1;

On March 9th, 1945, plaintiff filed her first amendment to the Bill of Complaint in which she alleged that she had an inchoate right of dower in all the real estate located in Broward County, Florida, setout and described in her Bill of Complaint, and that the fraudulent procuring of the title to said property by defendant, Shriver B. Tressler, to be placed in the name of defendant, Kenneth Tressler, was done for the fraudulent purpose of defeating plaintiff's inchoate right of dower in said property and also her right of alimony and support (R. 35-36);

Plaintiff in her second amendment to the Bill of Complaint, filed on March 10th, 1945, filed a note, signed by Kenneth Tressler, payable to the order of Shriver B. Tressler, in the amount of $41,000.00 payable on or before five years and a mortgage deed dated January 29th, 1945, on what is known and designated in the record as the Maxwell Apartments, to secure said note and

which she alleges that after the defendant, Shriver B. Tressler, departed from their home, that she discovered and found, among other papers and documents, said note and mortgage deed to secure same, (R. 39-40);

The trial court on June 22nd, 1945, sequestrated said note of $41,000.00 and the mortgage deed securing same and ordered the same registered in the Public Records of Broward County, Florida, (R. 164);

The trial court on March 13, 1945, sequestrated the property in question and appointed a receiver, Ruth Westerberg, to take charge of same (R. 65);

On June 28th, 1945, the trial court entered an order allowing temporary alimony and support, costs and attorney fees, quasi in rem, against the defendant, Shriver B. Tressler, and all the property setout and described in plaintiff's Bill of Complaint and the amendments thereto and the rents and profits therefrom situated and located in Broward County, Florida, and within the jurisdiction of the Court, subject to any right, title, or interest of the defendant, Kenneth Tressler, that he may have in and to said property, or any part thereof, or may be decreed by the court thereafter and the receiver, Ruth Westerberg, was directed to take charge of all the property in Broward County, Florida, involved in the suit, including the note dated January 29th, 1945, in the sum of $41,000.00 executed by the defendant, Kenneth Tressler, payable to the order of Shriver B. Tressler secured by mortgage deed on what is known as the Maxwell Apartments (R. 261-264);

Decree pro confesso was entered against the defendant, Shriver B. Tressler, on the 17th day of April, 1945 (R. 73);

The defendant, Shriver B. Tressler, had actual notice of the filing and pendency of this suit as disclosed by the testimony adduced in the record by the following witnesses:

J. A. Fitzsimmons:

That a copy of the original Bill was delivered to him by Mr.

Davis on or about the time it was filed and that he talked with Shriver B. Tressler about it who knew of the pendency of this suit (R. 148);

Mrs. Anna Angel:

I saw Shriver B. Tressler on March 19th, 1945, in Clarksburg, West Virginia, and he said he knew and had read the contents of the Bill of Complaint filed in Fort Lauderdale, Florida, by Ada A. Tressler (R. 441)

The testimony adduced in the record sustains the allegations in the Bill of Complaint that the residence of plaintiff and defendant, Shriver B. Tressler, was Fort Lauderdale, Broward County, Florida, at the time that the defendant drove plaintiff from their home on March 3rd, 1945, and at the time of the filing of the Bill of Complaint herein on March 7th, 1945;

Anna Angel testified, that prior to the separation of plaintiff and defendant, Shriver B. Tressler, that she talked with both of them and that they stated to her that they had decided to make Fort Lauderdale, Florida, their permanent residence; Mr. Tressler stated that he had purchased a lot on Lido Drive on which he intended building a permanent home for himself and Ada (R. 439);

Sylvia Zoeller testified that Mr. Shriver B. Tressler bought a lot on Coral Isles for the purpose of establishing a homestead there (R. 429);

Coral Isles is located in the City of Fort Lauderdale, Broward County, Florida, as disclosed by this record.

Plaintiff, Ada A. Tressler, testified that she and her husband, Shriver B. Tressler, came to Fort Lauderdale for the sole purpose of establishing a home; Shriver B. Tressler purchased a lot over in Lido Drive and it was held by them by the entireties to build a home there to be their permanent residence with a summer home up in Garrett County, Maryland (R. 179);

The defendant, Kenneth Tressler, filed what purported to be a Special Appearance on April 16th, 1945, for the purpose of con-

testing the jurisdiction of the Circuit Court over the person and property of the defendant, Kenneth Tressler (R. 68);

The trial court entered an order on June 28th, 1945, that this is a suit quasi in rem insofar as it relates to the defendant, Kenneth Tressler; that the property setout and described in plaintiff's Bill of Complaint and the amendments thereto, and the rents therefrom, are located in Broward County, Florida, and within jurisdiction of the court and that the Special Appearance of the defendant, Kenneth Tressler, is a general appearance (R. 170);

On July 6th, 1945, a decree pro confesso was entered by the trial court against the defendant, Kenneth Tressler (R. 282-283);

Said decree pro confesso since said date and to the present date is in full force and effect and has never been vacated.

This is a suit in rem as to all the right, title and interest that the defendant husband, Shriver B. Tressler, has in and to the property setout and described in the Bill of Complaint and amendments thereto and the rents and profits derived therefrom located within the jurisdiction of the trial court.

This is a suit quasi in rem as to the defendant, Kenneth Tressler, and the property setout and described in the Bill of Complaint and amendents thereto located within the jurisdiction of the trial court.

The surety on the supersedeas bond, United States Fidelity and Guaranty Company, sought twice to inject the divorce decree, of Shriver B. Tressler, into the record in the court below (First R. 298) (2nd R. 390-397) which was disallowed and stricken by the trial court for the reason that the surety bond was filed prior to the date of the divorce decree of Shriver B. Tressler and that same was not a defense available to the surety company (Order striking first attempt R. 406) (Order on second attempt R. 397);

The surety company, United States Fidelity and Guaranty Company, and defendant, Kenneth Tressler, entered their notice of appeal on November 30th, 1945 (R. 407) and assigned as error,

the action of the court, in their assignment of error No. 6 (R. 413-414);

The trial court's action therein, together with other orders appealed from, was, by the Supreme Court of Florida, affirmed on the 2nd day of April, 1946, and the time for appeal by petition for certiorari to this court to review the action, of the Supreme Court of Florida, has long since expired and is not involved in this appeal.

The only other time the divorce decree of Shriver B. Tressler was sought to be injected into the record of the court below was by Kenneth Tressler on October 27th, 1945, when he filed a copy of the divorce decree as exhibit "A" to his motion, in the court below (R. 327), to dissolve receivership, discharge receiver, cancel Lis Pendens and for an accounting, which motion was disallowed and stricken from the record together with the exhibits (R. 401-403). No appeal was ever had, to the Supreme Court of Florida, on the action of the trial court in striking his motion and exhibit "A" from the files.

The defendant, Kenneth Tressler, filed this motion and exhibit "A" attached thereto, after a decree pro confesso (R. 282-283) had been entered against him and was still in full force and effect and had never been vacated and without permission of the court, which was in violation of the law and the rules of procedure in the State of Florida.

The trial court entered a final declaratory decree on January 7th, 1946, in which he held that all the property located in Broward County, Florida, in controversy, was held in trust by the defendant, Kenneth Tressler, for the defendant, Shriver B. Tressler, and that the said Shriver B. Tressler is the equitable and beneficial owner of all said property, both real and personal, and that the record legal title of said property is held by the defendant, Kenneth Tressler, in trust for the defendant, Shriver B. Tressler (R. 459);

On January 17th, 1946, the defendant, Kenneth Tressler, filed

his notice of appeal, from this final declaratory decree, to the Supreme Court of Florida (R. 470);

On July 2nd, 1946, the Supreme Court of Florida affirmed the decree of the lower court by per curiam opinion:

"The decree appealed from is affirmed." (R. 508);

On motion of plaintiff for clarification, the Supreme Court on the 31st day of July, 1946, ordered:

"The decree of said court was rendered on January 7th, 1946, as by inspection of the transcript of record, of the said Circuit Court, which was brought into the Supreme Court of the State of Florida by virtue of an appeal, agreeable to the laws of said state in such cases made and provided, fully and at large appears:

And Whereas, in the June term of said Supreme Court holden at Tallahassee A. D. 1946, the said cause came on to be heard before the said Supreme Court on the said transcript of record and was argued by counsel and in consideration whereof on the second day of July, A. D. 1946 it was considered by said Supreme Court that said decree of Circuit Court be, and the same is hereby affirmed." (R. 528-529)

The action of the Supreme Court on July 2nd, 1946, in affirming this final declaratory decree rendered by the trial court on January 7th, 1946, is sought to be reviewed by this court.

BRIEF AND ARGUMENT

It is the contention of the respondent that the question of giving full faith and credit, under Article 4, Section 1 of the Constitution of the United States, to the divorce decree of defendant, Shriver B. Tressler, has never been presented or passed upon by the trial court or the Supreme Court of the State of Florida.

This divorce decree of Shriver B. Tressler was sought to be injected twice into the record by the United States Fidelity & Guaranty Company in the trial court as a defense to its liability on a surety bond filed by it prior to the date of the divorce decree in an ancillary proceeding to the main suit for judgment under Sub-section (g) of Rule 35 of the Supreme Court of Florida. The trial court struck same from the record upon the grounds that same was not a defense available to the respondent, United States Fidelity and Guaranty Company, all of which appears in respondent's preface and statement of the case.

The only other time the divorce decree of Shriver B. Tressler was sought to be injected into the record in the court below was by the defendant, Kenneth Tressler, petitioner in this court, by attaching a copy of same to a motion to dissolve receivership, discharge receiver, cancel Lis Pendens and for an accounting, (R. 327-331).

At the time of the filing of this motion and exhibit "A" (copy of divorce decree) attached thereto, a decree pro confesso had, theretofore, been duly and regularly entered by the court against Kenneth Tressler and was then in full force and effect and has never been vacated to date hereof and said motion was filed without permission of the court, which was in violation of the law and the rules of procedure in the State of Florida, and by reason of which the court denied the motion and ordered same stricken from the record, together with exhibit "A," (R. 401-403).

The divorce decree of the husband, Shriver B. Tressler, has never been pleaded, or sought to be injected into the record by Shriver B. Tressler.

On the 17th day of January 1946, defendant, Kenneth Tressler, petitioner in this court, filed his notice of appeal from the final declaratory decree entered by the trial court on January 7th, 1946, (R. 470).

On this appeal there was no assignment of error setting forth the trial court's refusal to give full faith and credit to the decree of divorce obtained by the husband, Shriver B. Tressler.

In assignment of error No. 18, the order of the trial court dated November 9th, 1945, striking and denying defendant, Kenneth Tressler's motion to dissolve receivership, discharge receiver, cancel Lis Pendens and for an accounting, which motion incorporated an exemplified copy of the final decree of divorce of Shriver B. Tressler, is assigned as error, (R. 493).

This was an interlocutory order of the trial court entered November 9th, 1945, in which there was never any appeal to the Supreme Court of Florida, and the action of the trial court was based upon the Rules of Florida, Pleading and Practice.

In assignment of error No. 22 the appellant to the Supreme Court of Florida and petitioner herein, set out:

> "The chancellor erred in denying admittance in evidence of a exemplified copy of the final decree of divorce dated July 17th, 1945, awarded Shriver B. Tressler against Ada A. Tressler and proceedings thereon offered at the hearing held on October 16th, 1945." (R. 493)

As heretofore herein set out, this was the effort of the United States Fidelity and Guaranty Company to try to inject the divorce decree into the record below and the appeal was taken to the Supreme Court of Florida prior to the appeal in the instant case and the action of the lower court, in denying the United States Fidelity and Guaranty Company to rely upon same as a defense and striking the divorce decree from the record and denying said surety company to introduce the divorce decree as evidence in its behalf, was affirmed by the Supreme Court of Florida on the 2nd day of April, 1946. No review of the action of the Supreme

Court was sought in this court and the same is not involved in the petition for writs of certiorari now before this court.

We insist that this divorce decree could only be pleaded by the husband, Shriver B. Tressler, and that same is not available to the defendant, Kenneth Tressler.

In the case of Liberty Warehouse Company vs. Burley Tobacco Growers' Co-Operative Marketing Association, reported in 276 U. S. page 71, 72 L. Ed. 473, this Court held:

> "In order to prevail here the warehouse company must show that enforcement of the challenged judgment would deprive it—not another—of some right arising under the Constitution, or laws of the United States properly asserted below."

Cited as authority:

Southern Railway Co. vs. King, 217 U. S. 524;
Standard Stock Company vs. Wright, 225 U. S. 540;
Hendrick v. Maryland, 235 U. S. 610, 621;
Jeffrey Mfg. Co. vs. Blagg, 235 U. S. 571, 576;
Dahnke-Walker Co. vs. Bondurant, 257 U. S. 282, 289.

The appellant, Kenneth Tressler, filed his brief in the Supreme Court of Florida in which it was not argued or set up that the lower court had refused to give full faith and credit to the decree of divorce of Shriver B. Tressler, and for the first time there, in the Supreme Court of Florida, sought to raise the question of failure to give full faith and credit to the divorce decree, in his petition for re-hearing.

In the case of Angelo Herndon, Appellant, vs. The State of Georgia, reported in 295 U. S. 441-445, 79 L. Ed. 1530, this Court held:

> "The federal question was never properly presented to the State Supreme Court unless upon motion for re-hearing; and that Court then refused to consider it. The long-established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it."

Texas & P. R. Co. vs. Southern P. Co. 137 U. S. 48, 54, 34 L. Ed. 614, 617, 11 S. Ct. 10;

Loeber v. Schroeder, 149 U. S. 580, 585, 37 L. Ed. 856, 858, 13 S. Ct. 934;

Godchaux Co. v. Estopinal, 251 U. S. 179, 181, 64 L. Ed. 213, 214, 40 S. Ct. 116;

Rocker v. Fidelity Trust Co. 261 U. S. 114, 117, 67 L. Ed. 556, 563, 43 S. Ct. 288;

Tidal Oil Co. v. Flanagan, 263 U. S. 444, 454, 455, 68 L. Ed. 382, 387, 388, 44 S. Ct. 197, and cases cited.

The United States Supreme Court will not take jurisdiction to review a State Court decision unless it appears affirmatively from the record not only that a Federal Question was presented for decision to the high court of the state having jurisdiction, but that it's decision of the Federal Question was necessary to the determination of the cause, that the Federal Question was actually decided, or that the judgment as rendered could not have been given without deciding it.

Southwestern Bell Telephone Co. vs. State of Oklahoma, U. S. Okla. 1938, 50 S. Ct. 528, 303 U. S. 206, 82 L. Ed. 751;

Honeyman vs. Hanan (N. Y. 1937) 57 S. Ct. 350, 300 U. S. 14, 81 L. Ed. 476, appeal dismissed 50 S. Ct. 273, 302 U. S. 375, 82 L. Ed. 312;

Adams v. Russell, 229 U. S. 353, 33 S. Ct. 846, 57 L. Ed. 1224;

Palmer vs. State of Ohio, 248 U. S. 32, 39 S. Ct. 16, 63 L. Ed. 108;

Chgo. R. I. & P. R. Co., vs. Maucher, 248 U. S. 359, 39, S. Ct. 108 63 L. Ed. 294;

Williams vs. Keyes, Fla. 1939, 186 So. 250.

It is settled law that a decision resting on State Procedure or matters affecting the remedy sought to be enforced are governed by the laws of the forum, and a decision of the State Court on maners of State pleading or practice is not reviewable by the Supreme Court of the United States and does not present a Federal question.

Central Vermont Ry. Co. vs. White, 238 U. S. 507, 35 S. Ct. 865, 59 L. Ed. 1433, Ann. Cas. 1916B, 252;

Wood vs. Brady, 150 U. S. 18, 14 S. Ct. 6, 37 L. Ed. 981;

Gibson vs. Mississippi, 162 U. S. 565, 16 S. Ct. 904, 40 L. Ed. 1075; Williams vs. Keyes (Fla.) 186 So. 250.

The refusal of a State Court to permit the filing of a plea setting up a Federal Question does not necessarily involve a decision of such question so as to sustain a hearing in the Federal Supreme Court.

Western Union Telegraph Co. vs. Wilson, 213 U. S. 52, 29 S. Ct. 403, 53 L. Ed. 693.

Petitioner's contention that respondent, Ada A. Tressler, and plaintiff below, had no right to maintain this suit is untenable.

As hereinbefore shown the verified Bill alleged that she and her husband, Shriver B. Tressler, were residents of the State of Florida. The proof adduced clearly sustained this allegation of the Bill.

The plaintiff only seeks alimony and support, attorney's fees and suit money and does not seek a divorce.

The Supreme Court of Florida in a recent case, Kiplinger vs. Kiplinger, reported in 2 Southern Reporter (2d) page 870, in an opinion by Mr. Justice Chapman, now Chief Justice, as follows:

> "If the appellee had claimed divorce along with her prayer for maintenance, then the question of residence would have been a prerequisite for relief, Donnelly v. Donnelly, 39 Fla. 229, 22 So. 648, but divorce not having been prayed for and appellee resting her case on her prayer for maintenance alone, the question of her residence in the state became immaterial, Howell v. Howell, 113 Fla. 129, 151 So. 379, 154 So. 328."

> "It may be sound public policy in the administration of this statute on the part of the courts not to interfere with the marital status of residents of other states when temporarily within the State of Florida, but it is the view of the writer that a husband or father, while a resident of another State and temporarily within the jurisdiction of the courts of Florida, should not be permitted or allowed by his conduct to make

> his wife, child or children a public charge or charges on the State of Florida under the subterfuge of not being a resident of Florida and thereby being immune from suit and at the same time being financially able to support and maintain his dependents. Justice requires that a husband when financially able should contribute to the support and maintenance of his wife and minor children in all jurisdictions, regardless of place of residence or citizenship. The residential prerequisites of one of the parties as being essential to invoking the jurisdiction of the court under this Section is pure fiction, illogical, imaginary, not supported by any reasonable construction of the statute, and interferes with rather than promotes the administration of justice. See 27 Am. Jur. pages 25, 26, par. 419."

Petitioner's contention that in the caption of the Bill of Complaint it sets-out (Alimony Unconnected with Divorce, instead of "Alimony unconnected with cause of Divorce") raises no Federal question by which this court will review the action of the Courts of the State of Florida.

The sufficiency of the Bill of Complaint in the original, or principal suit, is not essential issue on an application for temporary alimony, solicitor's fees and costs, as such defects, if they exist in the original or principal suit, are amendable.

The case of Condon v. Condon, reported in 157 So. page 117, the Supreme Court of Florida held:

> "The only matter proper to be decided on the present appeal is whether or not the Court abused its discretion in making an order appealed from under the circumstances appearing of record in the cause at the time the order was made. The sufficiency of the Bill of Complaint is not essential in issue on an application for temporary alimony, solicitors' fees and costs, as defects, if they exist in the Bill as filed, may be amendable."

In the case of Driggers v. Pearson, 192 So. page 881, the Supreme Court of Florida held:

"The Bill of Complaint is not essentially in issue on an application for temporary alimony, solicitor's fees and costs as such amendable defects as may appear in the Bill may be amended prior to the entry of a final decree."

We quote from Volume 41 Am. Jur. page 249, Section 82:

"The theory of a pleading is to be determined from it's general scope and tenor, not from isolated allegations. It will be construed as proceedings upon the theory which is most apparent and most clearly outlined by the facts stated."

Cited as authority:

Pgh. C. C. & St. L. R. Co. vs. Sullivan, 141 Ind. 83, 40 NE 138, 27 L. R. A. 850.

We quote from Section 83, Volume 41, Am. Jur. page 349:

"The general theory of a pleading under modern practice provisions is that if the complaint or petition states the facts on which the plaintiff relies, it is not necessary for the plaintiff to label his action, or for him to state whether his cause of action is founded upon contract or upon tort. It is even immaterial on a demurrer if the complaint is otherwise sufficient, that the pleader has designated the action by a wrong name."

Amendments Under Florida Statutes and Procedure

We quote from Kooman on Florida Chancery Pleading and Practice page 265:

"Even upon the final hearing, when it clearly appears from the evidence that the plaintiff has a case which entitles him to relief, but which by reason of some defect or omission in the allegations of the bill is not brought fairly within the issues, he will generally be permitted to amend the bill and adapt its allegations to the case as proved."

"Pleadings may be amended even after an appeal has been taken or decided. Thus, where the appellate court has decided that the plaintiff is entitled to no relief on the facts alleged by him, plaintiff may amend to introduce new facts which would change equitable issues already decided.

In the case of Wordinger vs. Wirt et al, reported in 151 So. 47, the Supreme Court of Florida held:

> "Amendment of bill to present case for strict foreclosure of contract for sale of land by vendor, shown by evidence to be entitled to relief not fairly within issue because of defect or omission in allegations of bill, was properly allowed (Comp. Gen. Laws Supp. 1932, S 4902 (7)."

In the case of Johnston et al, vs. Johnston, reported in 165 So. 698, decided by the Supreme Court of Florida, was an appeal from a decree permitting an amended bill of complaint to be filed after the evidence was all in and then denying a motion to dismiss; the essential question being that the amended bill constituted a departure in pleading. It was held:

> "(1,2) The record and briefs of counsel have been examined, and while there are immaterial differences in verbiage and construction the ultimate purpose of both the original and the amended bill of complaint is identical, and this is the test on which the question of departure must turn. The amended bill was made necessary by reason of lack of allegations in the original bill, and such amendments are permissible under our practice..
>
> Wordinger v. Wirt, 112 Fla. 822, 151 So. 47;
>
> Zetrouer v. Zetrouer, 110 Fla. 312, 149 So. 343;
>
> Biscayne Realty & Ins. Co. v. Ostend Realty Co., 109 Fla. 1, 148 So. 560;
>
> Richmond v. Irons, 121 U. S. 27, 7 S. Ct. 788, 30 L. Ed. 864; 10 R.C.L. 494."

Federal Supreme Court will not review a mere declaratory judgment.

Liberty Warehouse Company vs. Burley Tobacco Growers' Co-Op. Marketing Assn., 43 S. Ct. 291, 276 U. S. 71, 72 L. Ed. 473.

Due Process of Law

The Fourteenth Amendment did not invest, and did not attempt to invest Congress with power to legislate upon subjects which

are within the domain of state legislature. Neither does it enable the Supreme Court of the United States to review decisions of the state courts on questions of state law. The Petitioner, Kenneth Tressler, has not been denied due process of law under Section 1 of the Fourteenth Amendment of the Constitution.

This is a suit quasi in rem as to the petitioner herein, Kenneth Tressler, and the property involved in this litigation in which a declaratory decree was sought under Chapter 21820 of the Declaratory Act of the Legislature of the State of Florida, which act is hereto attached as Appendix No. 1.

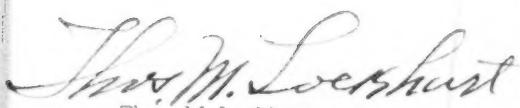
This petitioner entered his appearance and litigated this cause in the court below and in the Supreme Court of Florida, this last appeal being the fourth appearance therein, and the court below and the Supreme Court of Florida have both held that he had no interest in the property, but held same in trust for his father, Shriver B. Tressler.

In the case of Fox River Paper Co. vs. Railroad Commission of Wisconsin, 47 S. Ct. 669, 274 U. S. 651, 71 L. Ed. 1279, affirming 208 N. W. 266, 189 Wis. 626, in an opinion by Mr. Justice Stone held:

> "We are not concerned with the correctness of the rule adopted by the state court, it's conformity to authority, or it's consistency with related legal doctrine. It is for the state court in cases such as this to define rights in land located within the state and the Fourteenth Amendment, in the absence of an attempt to forestall our view of the constitutional question, affords no protection to supposed rights of property which the state courts determine to be non-existent.
>
> We accept as conclusive the state court's view of the nature of the rights of riparian owners. We therefore find in the refusal of the commission to grant the permit no denial of property rights of plaintiffs and hence no violation of the Fourteenth Amendment."

WHEREFORE, Ada A. Tressler, and Ruth Westerberg as receiver, respondents, respectfully submit this their objections to the jurisdiction of this Court to grant writs of certiorari.

Thos. M. Lockhart
and Robert J. Davis,
Counsel for Respondents,
Ada A. Tressler and
Ruth Westerberg,
as Receiver.



Thos. M. Lockhart,
Of Counsel,
517-20 Sweet Building,
Fort Lauderdale, Florida.

APPENDIX NO. 1

"CHAPTER 21820—(No. 186).

HOUSE BILL NO. 79

AN ACT Providing for Declaratory Decrees, Judgments and Orders, Establishing the Practice and Procedure in Regard Thereto, Authorizing Additional, Alternative, Coercive, Subsequent or Supplemental Relief in Connection Therewith, and Investing the Circuit Courts with Original Jurisdiction Thereof.

Be It Enacted by the Legislature of the State of Florida:

Section 1. The Circuit Courts of the State of Florida are hereby invested with authority and original jurisdiction and shall have the power upon a filed Bill of Complaint, Declaration, Petition or other appropriate pleadings to declare rights, status and other equitable or legal relations whether or not further relief is or could be claimed or prayed. No action or procedure shall be open to objection on the ground that a Declaratory Decree, Judgment or Order is prayed for. The Circuit Court's declaration, may be either affirmative or negative in form and effect and such Circuit Court declaration shall have the force and effect of a Final Decree, Judgment or Order. The Circuit Courts may render Declaratory Decrees, Judgments or Orders as to the existence, or nonexistence (a) of any immunity, power, privilege or right; or (b) of any fact upon which the existence or nonexistence of such immunity, power, privilege or right does or may depend, whether such immunity, power, privilege or right now exists or will arise in the future. Any person seeking a Declaratory Decree, Judgment or Order may, in addition to praying for a Circuit Court declaration, also pray for additional, alternative, coercive, subsequent or supplemental relief in the same action.

Section 2. Any person claiming to be interested or who may be in doubt as to his rights under a deed, will, contract or other article, memorandum or instrument in writing or whose rights, status or other equitable or legal relations are affected by a statute, or any regulation made under statutory authority, or by a municipal ordinance, contract, deed, will, franchise, or other article, memorandum or instrument in writing may have determined any question of construction or validity arising under such

statute, or other article, memorandum or instrument in writing, or any part thereof, and obtain a declaration of rights, status or other equitable or legal relations thereunder.

Section 3. A contract may be construed either before or after there has been a breach thereof.

Section 4. Any person interested as or through an executor, administrator, trustee, guardian, or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trustent, in the administration of a trust, or of the estate of a decedent, an infant, lunatic, or insolvent, may have a declaration of rights or equitable or legal relations in respect thereto:

(a) To ascertain any class of creditors, devisees, legatees, heirs, next of kin, or others; or

(b) To direct the executor, administrator, or trustee to or abstain from doing any particular act in his fiduciary capacity; or

(c) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.

Section 5. The enumeration in Sections 2, 3, and 4 does not limit or restrict the exercise of the general powers conferred in Section 1, in any proceeding where declaratory relief is sought; and also any Declaratory Decree, Judgment or Order given or made in pursuance of this Act may be given or made by way of anticipation with respect to any act not yet done or any event which has not yet happened, and in such case the said Decree, Judgment or Order shall have the same binding effect with respect to that future act or event, and the rights or liability to arise therefrom, as if that act or event had already been done or had already happened before the said Decrees, Judgment or Order was given or made.

Section 6. All Decrees, Judgments or Orders under this Act may be appealed to or reviewed by the Supreme Court of Florida in the same manner as other Decrees, Judgments and Orders.

Section 7. Further relief based on a Declaratory Decree, Judgment or Order may be granted whenever necessary or proper. The application therefor shall be by Petition to the Circuit Court

having jurisdiction to grant the relief. If the application be deemed sufficient, the Circuit Court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the Declaratory Decree, Judgment or Order, to show cause why further relief should not be granted forthwith.

Section 8. When a proceeding under this Act involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the Circuit Court in which the proceeding is pending. In order to settle questions of fact necessary to be determined before judgment can be rendered, the Circuit Court may direct their submission to a jury. When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the Court, whether a general verdict be required or not. Neither this section nor any other section of this Act shall be construed as requiring a jury to determine issues of fact in equity cases.

Section 9. In any proceeding under this Act, the Court may make such award of costs as in its sound judicial discretion may seem equitable and just.

Section 10. When declaratory relief is sought, all persons may be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceedings. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the Attorney General of the State of Florida or the State Attorney of the judicial circuit in which the action is pending shall also be served with a copy of the proceedings and be entitled to be heard.

Section 11. This Act is declared to be substantive and remedial; its purpose is to settle and to afford relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations; and is to be liberally administered and construed.

Section 12. The existence of another adequate remedy shall

not preclude a Decree, Judgment or Order for declaratory relief. The Circuit Court may order a speedy hearing of an action for a Declaratory Decree, Judgment or Order and may advance it on the calendar. When a suit for Declaratory Decree is filed as provided in this Act the Court shall have power to give as full and complete equitable relief as it would have had if such proceeding had been instituted as a bill in equity.

Section 13. The word "person" wherever used in this Act, shall be construed to mean any person, partnership, joint stock company, unincorporated association or society, or municipal or other corporation of any character whatsoever.

Section 14. The several sections and provisions of this Act are hereby declared independent and severable, and the invalidity, if any, of any part or feature thereof shall not affect the remainder of the Act or render the remainder of the Act invalid or inoperative.

Section 15. All laws or parts of laws in conflict with this Act are hereby repealed.

Section 16. This Act shall take effect upon becoming a law.

Approved by the Governor May 24, 1943.

Filed in Office Secretary of State May 24, 1943."

APPENDIX NO. 2

Sub-section (g) of Rule 35 of the Supreme Court of Florida.

"(g) Judgment Against Surety. By entering into a supersedeas or stay order bond given pursuant to these rules, any statute, or order of court, the surety submits himself to the jurisdiction of the lower court. After motion and citation his liability may be enforced without the necessity of an independent action."

APPENDIX NO. 3

Section 59.08 Revised General Statutes of the State of Florida.

"59.08 Writ of error and appeals, time for suing out

All writs of error in judgments in civil actions, and appeals in chancery whether from interlocutory orders or decrees, shall be sued out and taken within sixty days from the date of said judgment, or the entry of the order or decree appealed from. As amended Laws 1941, c. 20441, S. 1."